

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1806 of 1983

with

CIVIL APPLICATION No 435 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

1 to 5 No

KAUSHIKBHAI DEVNARAYAN

Versus

MANJULABEN @ KALAVATIBEN D. D/O DEVNARAYAN BALUSHANKAR

Appearance:

1. Civil Revision Application No. 1806 of 1983
MR SB VAKIL for Petitioner
MR SR DIVETIA for Respondent No. 1, 7, 8, 9,10
Respondent No. 2 Served
2. Civil Application No 435 of 1990
MR SB VAKIL for Petitioner
Respondent No. 2 served
MR SR DIVETIA for Respondent No. 1. 3, 7, 8, 9,10
Respondent No. 4 served

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 07/07/97

ORAL JUDGEMENT

1. The original defendant No.2 who is the petitioner has by this Civil Revision Application challenged the legality and validity of the order at Exhibit 112 in Civil Suit No. 1507 of 1980 dated 12th/16th of August, 1983 passed by the learned City Civil Judge, Ahmedabad. By the impugned order, the application was dismissed and it was directed that defendant Nos.2 and 11 to begin with the cross-examination of the plaintiff and her witnesses and thereafter defendant Nos. 1, 3, 4, 5, 7 to 10 will cross-examine the plaintiff and her witnesses and lastly defendant No.6 shall cross-examine the plaintiff and her witnesses.

2. It is pertinent to note that the suit is filed by the respondent No.1, original plaintiff in the City Civil Court for partition of the properties left behind by late Devnarayan. In such a suit for partition, the present petitioner - defendant No.2 and respondent Nos. 2 to 10 were the defendant Nos. 3 to 11. It appears that the defendant Nos. 1 and 3 to 9 had filed their written statements at Exhibit 22 dated 29th October, 1990, contested the suit, inter alia, contending that the late Devnarayan had executed the will dated 28th August, 1969 as well as the codicil dated 24.4.1977. The present petitioner who is defendant No.2 filed the written statement at Exh. 37 and contested the suit, inter alia, contending that late Devnarayan had executed the will not on 28th of July, 1969 but on 9th of May, 1977 and he denied the execution of the will dated 28th of July, 1969 and codicil dated 24th of April, 1977. The defendant No.6 by his written statement at Exhibit 83 contested the suit denying the will dated 27.8.1969 and the codicil dated 24th April, 1977 as well as the will dated 9th May, 1977 thereby supporting the case of the plaintiff that deceased Devnarayan has died intestate and has not executed any will. Defendant No.11 in his written statement at Exhibit 70 relied upon the will dated 27.8.1969.

3. It appears that upon the said pleadings, the trial court framed issues and examination-in-chief of the plaintiff was over. At that stage, the present petitioner made an application at Exhibit 112 dated 9th August, 1983 stating that it is the defendant No.1, who should cross-examine the plaintiff first, inter alia, contending that defendant No.1 should cross-examine the

plaintiff first and thereafter defendant No.2 should be called upon to cross-examine. Upon such application, the learned trial judge has passed a long speaking order and has placed reliance upon the judgment of the learned Single Judge of this Court in the case of Hiralal v.M.G. Pathak, reported in 5 GLR 327. After referring to the provisions to Order 18 of the Code of Civil Procedure, late Justice V.B. Raju, propounded the principle as to who should cross-examine the plaintiff first when some of the defendants are supporting the plaintiff either wholly or in part and his Lordship laid down three propositions. The aforesaid decision of His Lordship late Justice V.B. Raju is also followed by His Lordship Justice T.U. Metha and the principles laid down by late V.B. Raju,J. are stated to be wholesome principles. Justice V.B. Raju had laid down the following proposition of law.

So far as the defendants go, the question which of the defendants should begin has not been dealt with in Order 18, C.P. Code. But on general principle, if any of the defendants supports the plaintiff in whole or in part, then he should address the Court and lead his evidence first before the other defendants who do not support wholly or in part the plaintiff's case. The order in which defendants lead evidence becomes important only when some of them support the case of the plaintiffs in whole or in part while the other do not. If all the defendants completely oppose the plaintiff's case, then the question of order of leading evidence amongst the defendants is immaterial. It is only when the defendants are divided into two groups, one group consisting of the defendants supporting the plaintiff's case in part and the other group consisting of defendants, who do not support the plaintiff's case in any part that the question of order of leading evidence becomes important. In such cases, among defendants the order of leading evidence should be as follows :-

- (1) Those defendants who fully support the case of the plaintiff.
- (2) Those defendants who partly support the case of the plaintiff.
- (3) Those defendants who do not support the case of the plaintiff in any part."

4. Now turning to the facts of the present case, Mr.S.B. Vakil, learned counsel appearing for the petitioner - original defendant No.2 challenged the legality and validity of the order passed by the trial court mainly on the ground that defendant No.2 cannot be said to be fully supporting the plaintiff and if his written statement is read as a whole, it can be said that he is contesting the suit of the plaintiff. According to him, defendant Nos. 1, 3 to 5 and 7 to 9, in their written statements are partially supporting the plaintiff and they will have to cross-examine the plaintiff first. From the memo of Civil Revision Application as well as from the averments made in the application at Exhibit 112 and from the averments made in the impugned order, he has submitted before the court that the defence taken by defendant No.2 was rather complex defence because in one breadth he disputed the allegation of the plaintiff that the property in the hand of the deceased was a self-acquired property because he himself wanted a share in the property while in another breadth he had supported the will dated 9th May, 1977 which would show the property in the hand of the deceased was a self-acquired property. He, therefore, submitted that the defendant No.2 cannot be said to be a person who is supporting the plaintiff and he cannot be called upon to cross-examine the plaintiff first in point of time before the defendant No.1 cross-examines.

5. The learned City Civil Judge has set out the defence of the various parties raised in their written statements and has come to the definite finding that from the pleadings of the parties though two different testaments are propounded and parties are claiming under the different wills, the defendant No.2 envisaged a person who is partly supporting the plaintiff and to that extent the defendant No.2 should be called upon to cross-examine the plaintiff first in point of time. The question as to whether who would cross-examine the plaintiff first has by this time well decided by the aforesaid judgment of Hirralal v. M.G. Pathak (supra) which is followed by Justice T.U. Mehta (as His Lordship then was) in the year 1973 and after properly interpreting the pleadings of the parties, the learned trial judge has passed the impugned order, where he has recorded a positive finding that the defendant No.2 and 11 should begin the cross-examination of the plaintiff and her witnesses and thereafter defendant Nos. 1, 3, 4, 5, 7 to 10 should cross-examine the plaintiff and her witnesses. The order passed by the learned City Civil Judge is thus, on proper appreciation of pleadings of the parties and actually the issues required to be decided in

a matter of this nature where two wills and codicil are propounded by the defendants as a defence in a suit for partition by the plaintiff, no jurisdictional error can be said to have been committed by the learned trial judge, if the defendant Nos. 2 and 11 are called upon to cross-examine the plaintiff first in point of time as their defence is partially supporting the plaintiff.

6. In view of the aforesaid, the present Civil Revision Application fails, the same is rejected. Rule is discharged with no order as to costs. Interim relief, if any, granted earlier stands vacated.

7. Mr. S.B. Vakil, learned Counsel for the petitioner has requested the court to stay the implementation and operation of this order for a period of six weeks to enable the petitioner to approach the higher forum. the request being just and proper, the same is granted. The stay is extended for a period of six weeks from today.

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